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7 UNITED STATES DISTRICT COURT
8 CENTRAL DISTRICT OF CALIFORNIA
9 WESTERN DIVISION
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11 ROBERTO EUGENE FANT, JR.,) No. ED CV 12-02041-VBK
12)
13 Plaintiff,) MEMORANDUM OPINION
14) AND ORDER
15 v.)
16) (Social Security Case)
17 CAROLYN W. COLVIN, Acting)
18 Commissioner of Social)
19 Security,)
20 Defendant.)
21 _____)
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18 This matter is before the Court for review of the decision by the
19 Commissioner of Social Security denying Plaintiff's application for
20 disability benefits. Pursuant to 28 U.S.C. §636(c), the parties have
21 consented that the case may be handled by the Magistrate Judge. The
22 action arises under 42 U.S.C. §405(g), which authorizes the Court to
23 enter judgment upon the pleadings and transcript of the Administrative
24 Record ("AR") before the Commissioner. The parties have filed the
25 Joint Stipulation ("JS"), and the Commissioner has filed the certified
26 AR.

27 Plaintiff raises the following issues:

28 1. Whether the Administrative Law Judge ("ALJ") erred in

1 failing to acknowledge or grant any weight to the mental
2 function assessments of treating psychiatrist, Dr. Kim,
3 consultative examiner Dr. Griffin, or the VA assessment of
4 total mental disability; and

- 5 2. Whether the finding that Plaintiff retains the residual
6 physical capacity to perform a reduced range of light work
7 is based on a legally proper disregard of the opinions of
8 occupational medicine specialist Dr. Guo.

9 (JS at 7.)

10
11 This Memorandum Opinion will constitute the Court's findings of
12 fact and conclusions of law. After reviewing the matter, the Court
13 concludes that for the reasons set forth, the decision of the
14 Commissioner must be reversed and the matter remanded.

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16 I

17 **THE ALJ'S ASSESSMENT OF PLAINTIFF'S MENTAL RESIDUAL FUNCTIONAL**
18 **CAPACITY IS NOT SUPPORTED BY SUBSTANTIAL EVIDENCE**

19 Plaintiff filed his applications for Disability Insurance
20 Benefits and Supplemental Security Income on February 9, 2007 alleging
21 an onset date of January 4, 1995. After administrative denials, a
22 hearing was held on April 14, 2009 before ALJ Radensky. (AR at 34-79,
23 180-181.) On July 1, 2009, the ALJ found Plaintiff to be not
24 disabled. (AR 122-130.)

25 By an Order dated February 18, 2011, the Appeals Council vacated
26 the Decision and remanded the matter. (AR 131-135.) In its Remand
27 Order, the Appeals Council ordered that Plaintiff have a new hearing,
28 and that evidence of his Veterans Administration ("VA") finding of

1 total disability, the State Agency psychiatric consultant's opinions,
2 and assessments of treating physician Huang be considered. The
3 breadth of the remand order is encompassed in the following language
4 in the Remand Order:

5 "To give further consideration to claimant's maximum
6 residual functional capacity during the entire period at
7 issue and provide rationale with specific references to
8 evidence of record in support of assessed limitations ... in
9 so doing, evaluate the treating and non-treating non-source
10 opinions pursuant to the provisions of [applicable
11 regulations and Social Security rulings] and explain the
12 weight given to such opinion evidence." (AR 134, emphasis
13 added.)
14

15 The Remand Order resulted in a new hearing on September 16, 2011
16 before the same ALJ, at which time Plaintiff was represented by a non-
17 attorney representative. (AR 80-114.) Thereafter, in a Decision dated
18 October 21, 2011, the ALJ found Plaintiff to be not disabled. A
19 request for review to the Appeals Council was denied and thus the
20 ALJ's Decision became the final decision of the Commissioner, and
21 resulted in this litigation.

22 The ALJ found severe impairments as follows: morbidly obese, neck
23 trauma, subjective left sided weakness not confirmed by objective
24 findings, left shoulder impingement, depressive disorder NOS, and
25 post-traumatic stress disorder. (AR 24.) After considering certain
26 evidence (but not all evidence in the record), the ALJ determined a
27 residual functional capacity which, with regard to mental limitations,
28 only restricted Plaintiff to performing moderately complex tasks with

1 up to 4-5 step instructions. (AR 26.)

2 Plaintiff's treating psychiatrist, beginning on December 6, 2005,
3 is William Kim of the VA. (AR 495-497.) This record contains
4 chronological treatment notes from Plaintiff's visits to the VA
5 Psychiatric Unit. (See AR 474, 489, 482, 492-493, 496.) Plaintiff
6 characteristically was viewed as suffering from some paranoid thinking
7 during these visits, with anxious mood and affect. (See, e.g., AR
8 471.) Dr. Kim was treating Plaintiff for post-traumatic stress
9 disorder ("PTSD"), as evidenced in a letter of January 24, 2008. (AR
10 295.) Plaintiff adhered to a medication and treatment regimen, but
11 Dr. Kim still found him to be very symptomatic and emotionally
12 unstable, suffering from frequent depression and anxiety, becoming
13 easily irritable, angry or fearful and reactive to triggers. (Id.)

14 On April 14, 2008, Dr. Kim completed a Psychiatric/Psychological
15 Impairment Questionnaire reflecting his treatment of Plaintiff over
16 two years. (AR 505-512.) Various clinical findings and symptoms were
17 noted, and of particular interest is Dr. Kim's assessment on a rating
18 scale from no evidence of limitation, to mildly limited, moderately
19 limited, and markedly limited, in 20 discrete areas. Marked
20 limitations were found in functional areas pertaining to sustained
21 concentration and persistence, social interactions, and adaptation.
22 (Id.) Dr. Kim was of the opinion that Plaintiff would be incapable of
23 tolerating a "low stress" work environment. (AR 510-511.)

24 In his first Decision, the ALJ rejected, apparently entirely, the
25 assessments of Dr. Kim as "inconsistent with substantial evidence of
26 record." This conclusion was based upon the ALJ's reliance on the
27 testimony of a medical expert ("ME"), Dr. Stolz, and a one-time
28 psychiatric consultative examination ("CE") by Dr. Parikh on August 5,

1 2007. (AR 127-128.)

2 In the second Decision following remand, the ALJ fails to even
3 mention Dr. Kim, apparently relying upon his evaluation of Dr. Kim's
4 reports from two years before. The ALJ, however, ignored the fact
5 that Dr. Kim had continued treating Plaintiff, and had rendered an
6 updated Psychiatric/Psychological Impairment Questionnaire on October
7 7, 2010. (AR 605-612.) In that Questionnaire, Dr. Kim again found
8 marked limitations in areas involving understanding and memory; marked
9 limitations in several areas concerning sustained concentration and
10 persistence; and marked limitations in several areas involving social
11 interactions. (AR 608-610.) Dr. Kim assessed that Plaintiff is not a
12 malingerer. (AR 611.) He again concluded that Plaintiff cannot
13 tolerate even a low-stress work environment. (Id.)

14 In the Commissioner's portion of the JS, he asserts that the ALJ
15 properly considered Dr. Kim's diagnoses and conclusions. (JS at 17, et
16 seq.) Again, what is ignored is the fact that the ALJ failed to
17 mention Dr. Kim's treatment and diagnoses in the period subsequent to
18 the issuance of the first Decision. Moreover, there is no indication
19 in the testimony of the mental health ME at the hearing (AR 89-92)
20 that he even reviewed or considered this evidence.

21 Plaintiff was also the recipient of a consultative psychological
22 examination by Dr. Griffin on December 8, 2010. (AR 614-619.) After
23 conducting a clinical interview and administering standardized tests,
24 Dr. Griffin also assessed marked limitations in critical areas (see
25 Discussion of Applicable Law, infra) in Plaintiff's ability to make
26 judgments on simple work-related decisions; interact appropriately
27 with the public; interact appropriately with supervisors; interact
28 appropriately with co-workers; respond appropriately to work pressures

1 in a usual work setting; and respond appropriately to changes in a
2 routine work setting. (AR 618.) Despite the Commissioner's insistence
3 that Dr. Griffin's conclusions are diluted by some of Plaintiff's
4 activities of daily living, such as attending weekly group meetings
5 for PTSD (see JS at 19), and Dr. Griffin's indication of test results
6 which "may indicate a broad tendency to magnify the level of
7 experience to illness or a characterological inclination to complain
8 or be self-pitying" (AR 617) (which the Commissioner characterizes as
9 "malingering"), the fact is that Dr. Griffin rendered specific
10 findings on critical areas of mental limitations which are highly
11 relevant in the Social Security context to the evaluation of
12 disability. The fact that the ALJ does not even mention Dr. Griffin's
13 report in the Decision renders it unreliable. The Commissioner's
14 invitation to the Court to determine that this omission is harmless
15 error is rejected, in large part because Dr. Griffin's findings
16 corroborate those of Dr. Kim, which that doctor rendered on two
17 occasions, concerning Plaintiff's mental functional limitations. The
18 importance of these assessments is highlighted by the law concerning
19 assessment of mental limitations, which the Court will set out at this
20 point.

21
22 **A. Applicable Law.**

23 In evaluating mental impairments, 20 C.F.R. §404.1520a(c)(3)(4)
24 and §416.920a(c)(3)(4) mandate that consideration be given, among
25 other things, to activities of daily living ("ADLs"), social
26 functioning; concentration, persistence, or pace; and episodes of
27 decompensation. These factors are generally analyzed in a Psychiatric
28 Review Technique Form ("PRTF"). The PRTF is used at Step Three of the

1 sequential evaluation to determine if a claimant is disabled under the
2 Listing of Impairments; however, the same data must be considered at
3 subsequent steps unless the mental impairment is found to be not
4 severe at Step Two. See SSR 85-16.

5 20 C.F.R. §§404.1520a(c)(1) and 416.920a(c)(1) require
6 consideration of "all relevant and available clinical signs and
7 laboratory findings, the effects of your symptoms, and how your
8 functioning may be affected by factors including, but not limited to,
9 chronic mental disorders, structured settings, medication and other
10 treatment."¹

11 SSR 85-16 suggests the following as relevant evidence:

12 "History, findings, and observations from medical
13 sources (including psychological test results), regarding
14 the presence, frequency, and intensity of hallucinations,
15 delusions or paranoid tendencies; depression or elation;
16 confusion or disorientation; conversion symptoms or phobias;
17 psycho-physiological symptoms, withdrawn or bizarre
18 behavior; anxiety or tension. Reports of the individual's
19 activities of daily living and work activity, as well as
20 testimony of third parties about the individual's
21 performance and behavior. Reports from workshops, group
22 homes, or similar assistive entities."

25 ¹ 20 C.F.R. §404.1545(c) and §416.945(c) also require
26 consideration of "residual functional capacity for work activity on a
27 regular and continuing basis" and a "limited ability to carry out
28 certain mental activities, such as limitations in understanding,
remembering, and carrying out instructions, and in responding
appropriately to supervision, co-workers, and work pressures in a work
setting."

1 It is also required under §404.1520a(c)(2) and §416.920a(c)(2)
2 that the ALJ must consider the extent to which the mental impairment
3 interferes with an "ability to function independently, appropriately,
4 effectively, and on a sustained basis" including "such factors as the
5 quality and level of [] overall functional performance, any episodic
6 limitations [and] the amount of supervision or assistance []
7 require[d]."

8 Pursuant to the September 2000 amendments to the regulations
9 which modify 20 C.F.R. §404.1520a(e)(2) and §416.920a(e)(2), the ALJ
10 is no longer required to complete and attach a PRTF. The revised
11 regulations identify five discrete categories for the first three of
12 four relevant functional areas: activities of daily living; social
13 functioning; concentration, persistence or pace; and episodes of
14 decomposition. These categories are None, Mild, Moderate, Marked, and
15 Extreme. (§404.1520a(c)(3), (4).) In the decision, the ALJ must
16 incorporate pertinent findings and conclusions based on the PRTF
17 technique. §404.1520a(e)(2) mandates that the ALJ's decision must show
18 "the significant history, including examination and laboratory
19 findings, and the functional limitations that were considered in
20 reaching a conclusion about the severity of the mental impairment(s).
21 The decision must include a specific finding as to the degree of
22 limitation in each of the functional areas described in paragraph (c)
23 of this section."

24 The Step Two and Three analyses (see Decision at AR 53-54) are
25 intended to determine, first, whether a claimant has a severe mental
26 impairment (Step Two), and if so, whether it meets or equals any of
27 the Listings (Step Three). It is also required under §404.1520a(c)(2)
28 and §416.920a(c)(2) that the ALJ must consider the extent to which the

1 mental impairment interferes with an "ability to function
2 independently, appropriately, effectively, and on a sustained basis"
3 including "such factors as the quality and level of [] overall
4 functional performance, any episodic limitations [and] the amount of
5 supervision or assistance [] require[d]."

6 These findings and conclusions are relevant to the Step Two and
7 Three analysis of whether a claimant has a severe mental impairment,
8 and if so, whether it meets or equals any of the Listings. (See 20
9 C.F.R. Part 4, subpart p, App. 1.) The discussion in Listing 12.00,
10 "Mental Disorders," is relevant:

11 "The criteria in paragraphs B and C describe
12 impairment-related functional limitations that are
13 incompatible with the ability to do any gainful activity.
14 The functional limitations in paragraphs B and C must be the
15 result of the mental disorders described in the diagnostic
16 description, that is manifested by the medical findings in
17 paragraph A.

18 In Listing 12.00C, entitled 'Assessment of Severity,'
19 it is stated that, 'we assess functional limitations using
20 the four criteria in paragraph B of the Listings: Activities
21 of daily living; social functioning; concentration;
22 persistence, or pace; and episodes of decompensation. Where
23 we use 'marked' as a standard for measuring the degree of
24 limitation, it means more than moderate but less than
25 extreme."

26
27 Social Security Ruling ("SSR") 96-8p makes the same point in
28 distinguishing evidence supporting a rating of mental severity at Step

1 Two, a Listing level impairment at Step Three, and the determination
2 of an individual's MRFC at Step Four.

3 In addition to the foregoing deficiencies in the ALJ's evaluation
4 of the mental health evidence, although the VA assessed that Plaintiff
5 is 100% disabled, in his Decision, based on the testimony of the
6 mental health ME at the hearing, the ALJ interpreted the VA evidence
7 as demonstrating that "the VA treatment notes show no cognitive
8 problems, generally stable to normal mental status exams, and so the
9 VA rating is given little weight." (AR 28.) For reasons which have
10 already been discussed, the Court rejects this characterization of the
11 VA mental health treatment notes and diagnoses, which in fact do not
12 indicate a stable or unremarkable mental condition. Moreover, the ALJ
13 failed to discharge the instructions of the Appeals Council to
14 evaluate the VA disability rating as it applies to the Social Security
15 context. The Ninth Circuit has clearly held that a VA rating of
16 disability, while it does not necessarily compel the Social Security
17 Administration to reach an identical conclusion, must be given great
18 weight by an ALJ in the disability determination process. See McLeod
19 v. Astrue, 640 F.3d 881, 886 (9th Cir. 2011).

20 The Court will not devote substantial attention to Issue Two,
21 which concerns the assessment as to Plaintiff's RFC in the physical
22 arena. Since this matter will be remanded for a new hearing, this
23 evidence will be reevaluated, and if necessary, new evidence will be
24 adduced to make a determination of this issue.

25 In remanding this matter, the Court will take the rare step of
26 ordering that it be assigned to a new ALJ. The Court does not have
27 confidence that the present ALJ will give a fair and neutral
28 evaluation to the evidence, in view of the nature of the deficiencies

1 which occurred on remand.

2 For the foregoing reasons, this matter will be remanded for
3 further hearing consistent with this Memorandum Opinion.

4 **IT IS SO ORDERED.**

5
6 DATED: August 5, 2013

/s/

VICTOR B. KENTON
UNITED STATES MAGISTRATE JUDGE